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No. 90-1009

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IN THE

Supreme Court of the United States

October Term, 1990

EGBERT BAGG, IV and CAROLINE BAGG MONSON,

Petitioners,

against

NEW YORK DEPARTMENT OF ENVIRONMENT CONSERVATION,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari

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THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1991
(4684—CVR-353)

Question Presented

Does the Judgment of the New York courts rest entirely on state law grounds, where this proceeding was dismissed upon the finding that petitioners were not aggrieved persons within the meaning of New York Eminent Domain Procedure Law § 207?

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Statement of the Case

This proceeding is closely related to *Vaccaro v. Jorling*, No. 90-540, in which this Court denied a petition for writ of certiorari on November 5, 1990.[1] Each proceeding challenges the same determination by the New York Commissioner of Environmental Conservation to acquire by appropriation a 1063 ± acre parcel of wild forest land in the Adirondack Park, known as the "Pine Lake prop-

[1]We find petitioners' failure to mention this decision puzzling, since we forwarded a copy to petitioners' counsel.

erty". This parcel is entirely surrounded by state-owned forest preserve land and contains two lakes, a section of the South branch of the West Canada Creek, several streams and a wetland. The petitioner in *Vaccaro* is the fee owner of the parcel, and petitioners Bagg and Monson hold only a life estate in the same property. This interest includes an exclusive right of use and possession of approximately eight acres of the Pine Lake property and non-exclusive rights to use and enjoy the remaining portion. As described by the Appellate Division, these non-exclusive rights include the right to use a water supply, certain easement rights of egress and ingress, the rights to boat on Pine Lake and to hunt, fish and cut firewood on the remainder of the property (A12).[2]

New York Environmental Conservation Law (ECL) § 9-0105(7) authorizes the New York Department of Environmental Conservation to acquire lands within New York's Adirondack Park which are "deemed necessary for the enlargement of the forest preserve or for the conservation of the lands, forests and waters within the state * * *". New York's Environmental Quality Bond Act of 1972 in turn allocated $44 million for the acquisition of land as additions to the Adirondack forest preserve. ECL §§ 51-0701(1); 51-0703(1).

The Adirondack Park is a six million acre patchwork of public and private lands in Northern New York. ECL § 9-0101(1). Approximately 40% of the park is owned by the State and is known as the "forest preserve". ECL § 9-0101(6). The natural resources and open space of the Adirondack Park are unique and time-honored assets of New York State. For more than a century, New York's Constitution has preserved the wild forest character of the

[2]Parenthetical references are to the petitioners' appendix.

State's Adirondack forest preserve, providing in Article XIV, § 1:

> The lands of the state, now owned or hereafter acquired constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.

Following a public hearing pursuant to Article 2 of the Eminent Domain Procedure Law (EDPL), the Commissioner of Environmental Conservation issued a determination ordering the appropriation of the Pine Lake property (A20-27). The Commissioner found that this acquisition would serve a public purpose, "regardless of the availability of other land for acquisition or the existence of other land in the Forest Preserve" (A23). Specifically, the Commissioner determined in pertinent part that the acquisition would consolidate state-owned forest preserve lands, provide additional public recreational opportunities and protect natural resources from development (A25-26). The determination expressly provided that the Bagg and Monson life estates "on a portion of the Pine Lake Property will be honored and the appropriation will be subject to those rights" (A26).

Both the fee owner, Vaccaro, and the petitioners here commenced proceedings pursuant to EDPL § 207 in the Appellate Division of New York State Supreme Court to review the Commissioner's determination. The proceedings were consolidated for decision in the Appellate Division, and that court confirmed the Commissioner's determination (A7-19). As to this proceeding, the court held that petitioners Bagg and Monson were not "aggrieved

persons under EDPL 207(a) because the appropriation was expressly made subject to their interest" (A11).[3] The court found that their exclusive rights had been preserved and that their non-exclusive rights were in the nature of an easement over the remainder of the property for the duration of their life estates (A12). Under New York law, held the court, such easement rights are subject to the fee owner's general use and enjoyment of the property. Thus, allowing public access to that portion of the property does not interfere with petitioner's legal rights (A13). The court reached the merits in the *Vaccaro* proceeding, holding that the proposed acquisition was within the Commissioner's statutory authority and would serve a valid public purpose (A13-19).

Petitioners subsequently filed a notice of appeal to the Court of Appeals on constitutional grounds pursuant to CPLR 5601(b).[4] On April 3, 1990, the Court of Appeals dismissed that appeal *sua sponte* on the ground that no substantial constitutional question is directly involved (A5-6). 75 NY2d 946. Petitioners then sought leave to appeal, first from the Appellate Division and then from the Court of Appeals. Both applications were denied (A1-4). Petitioners now seek a writ of certiorari in this Court.

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[3]EDPL 207(a) provides that any persons "aggrieved" by a condemnor's determination are entitled to judicial review.

[4]That provision provides in pertinent part for an appeal of right to the Court of Appeals:

> "1. From an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; * * *".

ARGUMENT

The writ should be denied, for the dismissal of this proceeding for lack of standing rests entirely upon state law grounds and the claims are, in any event, without merit.

The Appellate Division's dismissal of this proceeding rests entirely upon an independent and adequate state law ground. The court held that petitioners were not aggrieved within the meaning of EDPL 207 because (1) their exclusive rights were expressly preserved, and (2) under New York law public ownership of the remaining property did not unreasonably interfere with their non-exclusive rights. Since no federal question appears in this case, this Court lacks jurisdiction to review the state court decision under 28 USC § 1257. *Republican National Committee v. Burton,* 455 US 1302 (1982); *Cramp v. Board of Public Instruction of Orange Co.,* 368 US 278, 281 (1961).

Petitioners nevertheless argue that the issue of their standing in this Court raises a separate federal question, relying upon *Phillips Petroleum Co. v. Shutts,* 472 US 797 (1985), and *Princeton v. Schmid,* 455 US 100 (1982). In those cases, however, the state courts found that the parties had standing and adjudicated federal claims. This Court held that in such cases it was not bound by a state court's grant of standing and willingness to address federal claims. To come before this Court, parties must clear the additional barrier of standing to sue in an Article III court. In this case, however, the state court has dismissed a proceeding for lack of standing under state law. That judgment rests on an adequate and independent state law ground, foreclosing jurisdiction in this Court. *Cramp v. Board of Public Instruction, supra,* 368 US at 281-282.

Moreover, even if this Court did address the issue of standing *de novo,* it is clear that petitioners do not meet the federal test of standing. That test requires a showing that the petitioners will suffer some direct injury in fact as a result of the State's appropriation. *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 US 464, 472 (1982). This appropriation will not, however, impair petitioners' exclusive right to possess eight acres of this parcel, for that right will remain intact. Nor will it affect their non-exclusive right to use and enjoy the remaining portion. As noted by the Appellate Division, petitioners have no legal right under state law to prevent the owner from permitting public access to the property or from selling it to any third party, including the State. *See, Wechsler v. People,* 147 AD2d 755, 757 (3d Dept 1989); *Rahabi v. Morrison,* 81 AD2d 434, 440 (2d Dept 1981). It follows, therefore, that an appropriation by the State causes them no injury.

Finally, even if this Court should consider the merits of petitioners' application for a writ of certiorari, it is clear that petitioners have failed to raise a meritorious constitutional claim. Petitioners have mounted the same constitutional challenges to the Commissioner's determination that were raised in the *Vaccaro* proceeding, in which this Court denied certiorari in November. They urge that the proposed appropriation would not serve a valid public use, that it is unnecessary and that it is excessive.[5] Those arguments provided no basis for certiorari when advanced by the landowner in *Vaccaro,* so they obviously do not here when advanced by the life estate holders.

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[5]In their petition for a writ of certiorari, petitioners argue for the first time that their rights in this parcel have been "singled out" for appropriation, depriving them of equal protection (Pet, pp 39-40). Since this issue was not raised below, it is not properly before this Court on review of the state court decision. *Cardinale v. Louisiana,* 394 US 437 (1969).

Although ignored by petitioners, in *Adirondack Railway Co. v. State of New York,* 176 US 335, 349 (1900), this Court long ago recognized that the addition of lands to the Adirondack forest preserve constitutes a valid public purpose. Article XIV, section 1 of the New York Constitution establishes that the protection for future generations of the wild forest lands constituting the Adirondack forest preserve provides an important public benefit to the people of this state.

This Court has also long recognized that the necessity of exercising the power of eminent domain for what is undeniably a public purpose is a legislative determination that is not subject to judicial oversight. *Joslin Manufacturing Co. v. City of Providence,* 262 US 668, 678 (1923); *North Laramie Land Co. v. Hoffman,* 268 US 276, 284 (1925). Thus, courts will not review the size of a public project area such as the Adirondack forest preserve (*Berman v. Parker,* 348 US 26, 35-36 [1954]) or the necessity for appropriating a particular parcel to accomplish a public purpose. *Adirondack Railway Co. v. State of New York,* 176 US at 349.

There is no merit to this petition for certiorari, and it should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York
January 10, 1991

Respectfully submitted,

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